

Claimant appeals raising the following issues in reference to this review and modification proceeding:

- (1) Whether a scheduled injury award can be reviewed and modified after the award is paid in full; and,
- (2) Whether the claimant's functional disability has increased to entitle her to a modification of an award pursuant to K.S.A. 44-528.

During oral argument before the Appeals Board, the respondent also raised the following single issue:

- (3) Whether evidence in the record of an original award can be considered in a review and modification proceeding.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

After a review of the record, considering the briefs and the arguments of the parties, the Appeals Board finds as follows:

The original Award was entered by Administrative Law Judge David V. Jackson on October 21, 1992. This case contains two docket numbers: 155,949 with date of accident from April 17, 1990 to August 23, 1990; and 155,950 with date of accident of August 23, 1990. The Administrative Law Judge denied claimant benefits in Docket No. 155,949 and granted claimant a twenty-four percent (24%) loss of use of her right lower extremity in Docket No. 155,950. The Award was sustained by the Director on November 3, 1992 and affirmed on appeal to the District Court on January 25, 1993. No appeal was later taken from that judgement.

Claimant then filed a Petition for Review and Modification before the Administrative Law Judge on July 23, 1993, concerning only Docket No. 155,950. The Petition alleges that claimant's right leg has progressively worsened, causing an increase in her disability. The Administrative Law Judge, in the Award of Review and Modification dated January 28, 1994, denied claimant's request for modification. From that Award, claimant appeals to the Appeals Board pursuant to K.S.A. 44-551(b)(1), as amended by S.B. 59 (1995).

- (1) The first issue that the Appeals Board will address is whether a scheduled injury award can be reviewed and modified after the award is paid in full.

Since the original Award was for a scheduled injury of twenty-four percent (24%) loss of use of the right lower extremity, only 23.66 weeks were due and would have been paid in full prior to the District Court's decision dated January 25, 1993. Respondent argues that an award paid in full is not subject to review and modification. The Administrative Law Judge agreed and held that the claimant had an increase in impairment of the right lower extremity but was not entitled to additional compensation because the prior Award had been paid in full. Claimant argues that an award that has been paid in full is subject to review and modification. The Appeals Board agrees with the claimant and finds that under the facts and circumstances of this case, the Award, even though being paid in full, is subject to review and modification.

The review and modification statute in effect on the claimant's date of accident, August 23, 1990, was last amended in July 1974 and reads in pertinent part as follows:

“Any award or modification thereof agreed upon by the parties, . . . whether the award provides for compensation into the future or whether it does not, may be reviewed by the director for good cause shown upon the application of the employee, employer, dependent, insurance carrier or any other interested party.” K.S.A. 1990 Supp. 44-528.

The prior statute, before the July 1, 1974 amendment, read in pertinent part as follows:

*“At any time before but not after the final payment has been made under or pursuant to any award or modification thereof agreed upon by the parties, . . . it may be reviewed by the director for good cause shown upon the application of either party . . . .”* K.S.A. 44-528. (Emphasis supplied.)

The 1974 Legislature specifically deleted the words “[a]t any time before but not after the final payment has been made.” The Kansas Supreme Court refused to apply the amended statute in a review and modification proceeding holding that the July 1, 1974 amendment was substantive and not procedural. However, the Court stated that if the amendment had been applicable, claimant would have been permitted to file a motion for review and modification even though the final payment was made under the workers compensation award. Eakes v. Hoffman-LaRoche, Inc., 220 Kan. 565, 552 P.2d 998 (1976).

(2) The next question to be considered is whether the claimant's functional disability has increased to enable a modification of the original Award. Claimant also argued that the original Award was inadequate which requires modification of the Award. The claimant contended that an award may be modified by a mere showing that it was excessive or inadequate. Claimant cites the case of Morris v. Kansas City Bd. of Public Util., 3 Kan. App. 2d 527, 598 P.2d 544 (1979), as holding that a modification can be made if an award is inadequate. However, in that case the Court clarified that the party asserting that an award is excessive or inadequate has the burden of establishing changed conditions. *Id.* at 531. Accordingly, the Appeals Board finds that when a party asserts in a motion for review and modification that the award was excessive or inadequate, that party has the burden of establishing a change in conditions. The purpose of the review and modification statute is only to retry a case if there has been a change in conditions or when new evidence has been found not discoverable during the initial litigation.

In the instant case, two physicians testified as to claimant's physical condition. Ernest R. Schlachter, M.D., testified on behalf of the respondent in the original Award and for the review and modification proceeding. Dr. Schlachter reported his original findings concerning his first examination of claimant in a report dated March 25, 1992. He subsequently examined the claimant on September 15, 1993. Dr. Schlachter diagnosed the claimant's condition as being reflex sympathetic dystrophy. He opined her symptomatology had decreased and rated her as having a four percent (4%) permanent partial functional impairment of the whole body. Dr. Schlachter further testified that the claimant's condition had improved since he had seen her in March 1992. In fact, the claimant's functional impairment had decreased from five percent (5%) to four percent

(4%). His permanent restrictions remained the same except he increased the amount of time she could be on her feet in an eight-hour work day.

J. Stanley Jones, M.D., an orthopedic surgeon, was the other physician who testified. Dr. Jones had been treating the claimant for over two years for sympathetic dystrophy. Dr. Jones did not testify in the original Award. Dr. Jones agreed that the claimant, in March 1992, made the same complaints to Dr. Schlachter as her complaints were at the present time. Dr. Jones testified that claimant possibly was a little bit worse now than when he started treating her in 1990. Additionally, Dr. Jones testified that the claimant's current job could explain some of the increase that she has in her symptomatology. Dr. Jones rated claimant of having a twenty-seven percent (27%) functional impairment to her right lower extremity. He then converted this rating to an eleven percent (11%) whole body rating based on sympathetic dystrophy relating to the nervous system. That impairment rating was a result of Dr. Jones' examination of claimant on November 11, 1993. Dr. Jones had not rated the claimant until that date.

The original Award entered in this case granted claimant a permanent partial general disability to her right lower extremity based on a twenty-four percent (24%) permanent impairment rating opinion of Dr. Philip Mills. Dr. Mills did not testify in this review and modification proceeding. Accordingly, there is no evidence that the claimant's condition has worsened since the original Award was entered, except for Dr. Jones' opinion that the claimant has possibly worsened. On the other hand, Dr. Schlachter examined the claimant both in March 1992 and September 1993 and testified that the claimant had improved. The Appeals Board finds that the claimant has failed to meet her burden of proving that it is more probably true than not that her physical condition has worsened since the original Award was entered. Therefore, since there has been no or little change in claimant's physical condition, the Appeals Board affirms the Award of Review and Modification entered by Administrative Law Judge Shannon S. Krysl which denied claimant's request for an increase in functional impairment or an award of work disability.

(3) In regard to the issue of whether evidence introduced in the record of an original award can be considered in review and modification proceedings, the Appeals Board finds that it is appropriate and necessary to use the record established in an original award in a review and modification proceeding. This record must be reviewed in order that the trier of fact can be familiar with the facts and circumstances at the time the original award was entered. However, if there is a change in the facts and circumstances since the original award was entered, such changes could render some of the original testimony and evidence irrelevant for review and modification purposes. For example, vocational and rehabilitation expert testimony contained in an original award could be irrelevant in a review and modification proceeding if the claimant's employment status had changed from the original award.

The Administrative Law Judge also found that the claimant's attorney is entitled to reasonable and customary attorney fees in filing the Petition for Review and Modification for the claimant. The Appeals Board agrees with this finding as the provision in reference to attorney fees in K.S.A. 44-536(g) is mandatory. The Appeals Board finds no statement for attorney fees entered into the evidentiary record. Accordingly, any such evidence would have to be submitted to the Administrative Law Judge for approval and order.

**AWARD**

**WHEREFORE**, it is the finding, decision, and order of the Appeals Board that the Award of Review and Modification of Administrative Law Judge Shannon S. Krysl, dated January 28, 1994, is affirmed and an award of review and modification against the respondent, EVCON Industries, Inc., and its insurance carrier, St. Paul Fire & Marine Insurance Company, and in favor of the claimant, Sandra Wolf, is denied.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of July 1995.

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BOARD MEMBER

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c: Stephen J. Jones, Wichita, KS  
Vincent A. Burnett, Wichita, Ks  
Shannon S. Krysl, Administrative Law Judge  
David A. Shufelt, Acting Director